

1 SENATE BILL 436

2 **48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007**

3 INTRODUCED BY

4 James G. Taylor

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9  
10 AN ACT

11 RELATED TO PUBLIC WORKS; PROVIDING FOR ALTERNATIVE METHODS OF  
12 PROVIDING SECURITY FOR CONTRACTORS AND SUBCONTRACTORS.

13  
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

15 Section 1. Section 13-1-146 NMSA 1978 (being Laws 1984,  
16 Chapter 65, Section 119) is amended to read:

17 "13-1-146. REQUIREMENT FOR BID SECURITY.--Bid security  
18 shall be required of bidders for construction contracts  
19 procured by competitive sealed bid when the price is estimated  
20 by the procurement officer to exceed twenty-five thousand  
21 dollars (\$25,000). Bid security in an amount equal to at least  
22 five percent of the amount of the bid shall be [~~a bond provided~~  
23 ~~by a surety company authorized to do business in this state, or~~  
24 ~~the equivalent in cash, or otherwise supplied in a form~~  
25 ~~satisfactory to the state agency or a local public body]~~

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1 provided pursuant to the provisions of Section 13-4-18.1 NMSA  
2 1978."

3 Section 2. Section 13-1-146.1 NMSA 1978 (being Laws 2003,  
4 Chapter 305, Section 1) is amended to read:

5 "13-1-146.1. DIRECTED SURETYSHIP PROHIBITED--PENALTY.--

6 A. Except to the extent necessary to ensure that  
7 a surety company or personal surety meets the requirements of  
8 Subsection A of Section 13-4-18 NMSA 1978, an employee of the  
9 state or its political subdivisions, or a person acting or  
10 purporting to act on behalf of that employee, shall not require  
11 a bidder or an offeror in a procurement for a construction  
12 contract pursuant to the Procurement Code to make application  
13 or furnish financial data for a surety bond or other security  
14 or to obtain a surety bond or other security from a particular  
15 surety company, insurance company, broker, [~~or~~] agent or  
16 personal surety in connection with the bid or proposal.

17 B. A person who violates Subsection A of this  
18 section is guilty of a misdemeanor and shall be sentenced in  
19 accordance with the provisions of Section 31-19-1 NMSA 1978."

20 Section 3. Section 13-4-18 NMSA 1978 (being Laws 1987,  
21 Chapter 109, Section 1) is amended to read:

22 "13-4-18. CONSTRUCTION CONTRACT PERFORMANCE AND PAYMENT  
23 BONDS OR OTHER SECURITY.--

24 A. When a construction contract is awarded in  
25 excess of twenty-five thousand dollars (\$25,000), the following  
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1 bonds or security shall be delivered to the state agency or  
2 local public body and shall become binding on the parties upon  
3 the execution of the contract. If a contractor fails to  
4 deliver the required performance and payment bonds, the  
5 contractor's bid shall be rejected and its bid security shall  
6 be enforced to the extent of actual damages. Award of the  
7 contract shall be made pursuant to the Procurement Code in the  
8 following manner:

9 (1) a performance bond or other security  
10 satisfactory to the state agency or local public body [~~executed~~  
11 ~~by a surety company authorized to do business in this state and~~  
12 ~~said surety to be approved in federal circular 570 as published~~  
13 ~~by the United States treasury department or the state board of~~  
14 ~~finance or the local governing authority]~~ in an amount equal to  
15 one hundred percent of the price specified in the contract  
16 shall be provided pursuant to the provisions of Section  
17 13-4-18.1 NMSA 1978; and

18 (2) a payment bond or other security  
19 satisfactory to the state agency or local public body [~~executed~~  
20 ~~by a surety company authorized to do business in this state and~~  
21 ~~said surety to be approved in federal circular 570 as published~~  
22 ~~by the United States treasury department or the state board of~~  
23 ~~finance or the local governing authority]~~ in an amount equal to  
24 one hundred percent of the price specified in the contract, for  
25 the protection of all persons supplying labor and material to

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1 the contractor or its subcontractors for the performance of the  
2 work provided for in the contract shall be provided pursuant to  
3 the provisions of Section 13-4-18.1 NMSA 1978.

4 B. The state purchasing agent or the central  
5 purchasing office may reduce the amount of the performance bond  
6 or other security required prior to solicitation to not less  
7 than fifty percent of the contract price if it is determined to  
8 be less costly or more advantageous to the state agency or  
9 local public body to self-insure a part of the performance of  
10 the contractor.

11 C. The state purchasing agent or the central  
12 purchasing office may reduce the amount of the payment bond or  
13 other security required prior to solicitation [~~of~~] to not less  
14 than fifty percent of the contract price if it is determined  
15 that it is in the best interest of the state agency or local  
16 public body to do so. Factors to be considered in order to  
17 make such a determination include, but are not limited to:

18 (1) the value and number of subcontracts to be  
19 awarded by the contractor; and

20 (2) the value of the contract.

21 D. Nothing in this section shall be construed to  
22 limit the authority of the state agency or local public body to  
23 require a performance bond or other security in addition to  
24 those bonds or other security, or in circumstances other than  
25 specified in Subsection A of this section.

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1           E. For contracts under twenty-five thousand dollars  
2 (\$25,000), the state agency or local public body may impose in  
3 its sole and complete discretion the requirements of  
4 Subsections A, B and C of this section."

5           Section 4. A new Section 13-4-18.1 NMSA 1978 is enacted  
6 to read:

7           "13-4-18.1. [NEW MATERIAL] FORMS OF SECURITY.--

8           A. Bid security required by Section 13-1-146 NMSA  
9 1978, performance security or payment security required by  
10 Section 13-4-18 NMSA 1978 and security required of  
11 subcontractors pursuant to Section 13-1-148.1 or 13-4-37 NMSA  
12 1978 shall be:

13                       (1) a bond executed by a surety company  
14 authorized to do business in the state;

15                       (2) a bond executed by a personal surety if:

16                               (a) the contractor or subcontractor has  
17 been denied corporate surety credit;

18                               (b) the personal surety is an individual  
19 who: 1) is a resident of New Mexico; 2) owns real property in  
20 New Mexico; 3) is not an officer of the court or an attorney  
21 licensed in New Mexico; 4) is not an owner or employee of the  
22 contractor or subcontractor; and 5) is not related by blood or  
23 marriage within the third degree to an owner or employee of the  
24 contractor or subcontractor;

25                               (c) the personal surety attaches an

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1 affidavit of individual surety on a form prepared by the United  
2 States general services agency; and

3 (d) the personal surety pledges one or  
4 more of the classes of assets specified in Subsection B of this  
5 section and in an amount equal to or greater than the aggregate  
6 amount of the required security, provided that the assets shall  
7 be pledged only for the intended security and may not be  
8 pledged for any other security or contract in or outside New  
9 Mexico until the asset is released by the obligee; or

10 (3) another form of security that is  
11 satisfactory to the obligee.

12 B. Assets pledged by a personal surety pursuant to  
13 Subparagraph (d) of Paragraph (2) of Subsection A of this  
14 section may be:

15 (1) cash or certificates of deposit;

16 (2) cash equivalents held with a federally  
17 insured financial institution, or other assets, that are  
18 evidenced by a security interest, including an irrevocable  
19 trust receipt, which security interest:

20 (a) is issued by the financial  
21 institution or by an independent trustee in the name of the  
22 obligee;

23 (b) is issued in accordance with the  
24 provisions of Article 9 of the Uniform Commercial Code;

25 (c) contains a payout clause in the

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1 event that default cannot be remedied; and

2 (d) identifies the solicitation or  
3 contract for which the security interest is provided;

4 (3) United States government securities at  
5 market value;

6 (4) stocks and bonds that are:

7 (a) actively traded on a national United  
8 States security exchange;

9 (b) accompanied by certificates issued  
10 in the name of the personal surety; and

11 (c) pledged at ninety percent of their  
12 low price over the last fifty-two weeks, as reflected at the  
13 time of submission of the bond;

14 (5) real property located in New Mexico:

15 (a) that is owned by the personal surety  
16 in fee simple or with co-tenants that all agree to act jointly;  
17 and

18 (b) the pledge of which is evidenced by  
19 a mortgage or deed of trust, if satisfactory to the obligee:

20 1) on which the face amount does not exceed seventy-five  
21 percent of the personal surety's equity interest in the  
22 property; and 2) which shall be recorded by the obligee in the  
23 office of the county clerk in which the real property is  
24 located; or

25 (6) irrevocable letters of credit that:

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1 (a) are issued by a federally insured  
2 financial institution in the name of the obligee;

3 (b) identify the obligee and the  
4 solicitation or contract for which the irrevocable letter of  
5 credit is provided; and

6 (c) contain a payout clause if default  
7 cannot be remedied.

8 C. As used in this section, "obligee" means:

9 (1) the state or the local public body; or

10 (2) if the security is provided on behalf of a  
11 subcontractor, "obligee" means the contractor."

12 Section 5. Section 13-4-37 NMSA 1978 (being Laws 1988,  
13 Chapter 18, Section 7, as amended) is amended to read:

14 "13-4-37. BOND REQUIREMENTS.--

15 A. It is the responsibility of each subcontractor  
16 submitting a bid to a contractor to be prepared to submit a  
17 faithful performance and payment bond or other security if so  
18 requested by the contractor.

19 B. In the event any subcontractor submitting a bid  
20 to a contractor does not, upon the request of the contractor  
21 and at the expense of the contractor at the established charge  
22 or premium therefor, furnish to the contractor a bond [issued  
23 by a corporate surety authorized to do business in New Mexico  
24 in accordance with the New Mexico Insurance Code and listed in  
25 the United States treasury department circular 570 wherein] or

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1 other security pursuant to the provisions of Section 13-4-18.1  
2 NMSA 1978 in which the contractor is named the obligee,  
3 guaranteeing prompt and faithful performance of the subcontract  
4 and the payment of all claims for labor and materials furnished  
5 or used in and about the work to be done and performed under  
6 the subcontract, the contractor may reject the bid and make a  
7 substitution of another subcontractor subject to the provisions  
8 of Section 13-4-36 NMSA 1978. Such bond or other security may  
9 be required at the expense of the subcontractor only if the  
10 contractor in [~~his~~] written or published request for  
11 subcontract bids:

12 (1) specifies that the expense for the bond or  
13 other security shall be borne by the subcontractor; and

14 (2) clearly specifies the amount and  
15 requirements of the bond or other security."

16 Section 6. A new section of the New Mexico Insurance Code  
17 is enacted to read:

18 "[NEW MATERIAL] EXEMPTION FROM AUTHORITY REQUIREMENT--  
19 PERSONAL SURETIES.--A certificate of authority shall not be  
20 required of a personal surety who only transacts insurance by  
21 providing personal surety bonds for public works projects  
22 pursuant to Section 13-4-18.1 NMSA 1978."